Supreme Court, U.S.
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No. 08- (1)

In the Supreme Court of the United States

Raymond M. Weinstein and John Barry,
Petitioners,

v.

The City of New York Department of Housing Preservation and Development and Cadman Towers, Inc.
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

PETITION FOR WRIT OF CERTIORARI AND SUMMARY DISPOSITION

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QUESTIONS PRESENTED FOR REVIEW

This case involves the due process implications of the filing in court of a faulty transcript of an administrative hearing, two courts' failure to rule on the admissibility of the transcript, and an appellate court's review of the faulty transcript under an unlawful substantial evidence standard.

1. Did respondent HPD deny petitioners due process by filing in court a transcript of an administrative hearing that was missing the first half (the testimony of respondent Cadman), a transcript petitioners had no opportunity to stipulate to or correct, when the law required a "certified transcript" or a "settlement of the transcript problem" by the parties or the judge?

2. Did the lower court err and deny petitioners due process by failing to rule on the admissibility of the faulty transcript, an issue of law that could have terminated the proceeding and remanded the case for a new hearing, when petitioners raised the issue in the pleadings and the law required the court to first rule on this issue before considering any transfer of the case to the Appellate Division for review?

3. Did the Appellate Division, in confirming HPD's decision against petitioners, err and deny petitioners due process by not remanding the case for a new hearing, ruling the faulty transcript was reviewable, and reviewing the transcript under a substantial evidence standard invalidated by statute in 1946 and contrary to current federal and state case law.

LIST OF PARTIES AND RULE 29(6) STATEMENT

The names of all parties in the proceedings in the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, are in the case caption.

The corporate disclosure statement under Rule 29(6) does not apply in this case. Petitioners are individuals, not a corporate entity.

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Kenneth F. Warren, *Administrative Law in the Political System*, Perseus Publishers, 2004. 13

PETITION FOR A WRIT OF CERTIORARI AND SUMMARY DISPOSITION

Petitioners Raymond M. Weinstein and John Barry respectfully request (1) a writ of certiorari be granted in this case to review the Decision and Judgment of the Appellate Division, Second Judicial Department, Supreme Court of the State of New York, dated April 17, 2007 and (2) an order be issued for a reversal without further hearing on the merits.

OPINIONS AND ORDERS

Reprinted in the Appendix are the following five official reports, published and unpublished, of the state court opinions and orders entered in this case:

1. State of New York, Court of Appeals, Motion No. 1347, February 7, 2008, page A-1.

2. State of New York, Court of Appeals, Motion No. 959, October 16, 2007, page A-2.

3. State of New York, Court of Appeals, Motion No. 787 SSD 38, July 2, 2007, page A-3.

4. Supreme Court of the State of New York, Appellate Division, Second Judicial Department, No. 2006-02181, April 17, 2007, published at 39 A.D.3d 764, reprinted on pages A-4 to A-6.

5. Supreme Court of the State of New York, Kings County, IAS Term, Part 19, Index No. 21896/05, February 2, 2006, pages A-7 to A-20.

JURISDICTION

Review is sought for the Decision and Judgment of the Appellate Division, Second Judicial Department, Supreme Court of the State of New York, No. 2006-02181, April 17, 2007, published at 39 A.D.3d 764, reprinted on pages A-4 to A-6. This Court has jurisdiction to review the order under 28 USC § 1257 (3) and to issue a summary disposition on the merits pursuant to Rule 16.1 of the *Rules of the Supreme Court of the United States*, adopted July 17, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ." **U.S. Const. amend XIV, § 1**.

This case also involves relevant parts of different statutory provisions of the Civil Practice Law and Rules of the State of New York ("CPLR"). These statutes and relevant parts are:

1. **CPLR § 7802, Parties**, provides, among other things, under subsections:

"(a) Definition of 'body or officer'. . . includes every court , tribunal, board, corporation, officer, or other person, or aggregation of persons . . . **(b)** . . . exercising judicial or quasi-judicial functions . . . ."

2. **CPLR § 7803, Questions raised**, provides, among other things, that the following question may be raised:

"1. whether the body or officer failed to perform a duty enjoined upon it by law;"

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

3. **CPLR § 7804, Procedure**, provides, among other things, under subsections:

"**(e) Answering affidavits; record to be filed; default.** The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration . . . . The court may order the body or officer to supply any defect or omission in the . . . transcript . . . ."

"**(f) Objections in point of law. . . .** The petitioner may raise an objection in point of law to a new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard."

"**(g) Hearing and determination; transfer to appellate division.** . . . Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could

terminate the proceeding . . . without reaching the substantial evidence issue . . . . When the proceeding comes before (the Appellate Division), whether by appeal or transfer, (it) shall dispose of all issues in the proceeding."

4. **CPLR § 5525, Preparation and settlement of transcript; statement in lieu of transcript**, provides, among other things, under subsection:

"**(c) Settlement of transcript.** 1. Within fifteen days after receiving the transcript from the court reporter or from any other source, the appellant shall make any proposed amendments and serve them and a copy of the transcript upon the respondent. . . . The original of the transcript shall be corrected by the appellant in accordance with the agreement of the parties or the direction of the court and its correctness shall be certified to thereon by the parties or the judge . . . ."

5. **CPLR § 5526, Content and form of record on appeal**, provides, among other things, that:

"The record on appeal from a final judgment shall consist of . . . the corrected transcript of the proceedings . . . if a trial or hearing was held . . . ."

STATEMENT OF THE CASE

This case deals with a fundamental right, one of the most important, in jurisprudence: the right to a fair review of a trial or administrative hearing. In the United States, every year, tens of thousands of civil and criminal cases in which a decision has been

rendered come before state and federal courts on appeal. A verbatim record or certified transcript of the trial or hearing, by law, must be filed with the court. The right to a fair review--a review based, among other things, on a verbatim record or certified transcript--is tied to a person's right to due process under the Fourteenth Amendment to the Constitution.

The Fourteenth Amendment is invoked in this case because of the potential loss of property, the right to live in and own a cooperative apartment in Brooklyn, New York. Petitioners, father and son, reside in a publicly-supported apartment building managed by respondent Cadman Towers, a co-op in the process of privatization. Respondent City of New York Department of Housing Preservation and Development ("HPD") oversees the operations of Cadman. HPD is a "public body" with "quasi-judicial functions" as defined in CPLR § 7802(a, b).

This case began in March 2004 when Cadman sought to evict petitioners and JOHN J. HOLUB, a disabled person and Barry's domestic partner, now deceased, from their apartment. Cadman alleged that Holub and Barry violated the terms of their occupancy agreement by not maintaining New York as their primary residence and illegally subletting their apartment to Weinstein. Cadman initiated eviction proceedings before HPD.

HPD conducted an eviction hearing in 2004 on two separate days, lasting three hours each day. By law, HPD had the responsibility of making a verbatim record of the hearing (CPLR § 7804[e]) and used a tape recorder for that purpose. In March 2005, two days

after Holub died, the hearing officer issued an eviction warrant for all three occupants of the apartment. In July 2005, petitioners filed a timely appeal to the HPD eviction warrant in Kings County Supreme Court pursuant to Article 78 of the CPLR.

In early September 2005 petitioners were informed that the first tape used on the first day of the hearing failed to record. Lost forever was almost three hours of testimony from a six-hour hearing, representing Cadman's whole case against petitioners and the start of Barry's testimony. A more detailed account of the facts and circumstances surrounding the failed tape and half-complete transcript is contained in the Appendix, pages A-15 to A-16, A-23 to A-24, A-33, and A-39 to A-40.

The constitutional questions raised in this case now before this Court pertain to this transcript issue. Petitioners believe they were denied due process by there different public bodies: (1) by respondent HPD filing in court a transcript of a hearing that was missing the first half, was not stipulated to by petitioners, and was not brought before the judge for settlement, (2) by the lower court failing to rule on the admissibility of the incomplete transcript, and (3) by the Appellate court reviewing the half-transcript under an unlawful substantial evidence standard.

1. The Unlawful Filing of the Half-Transcript

The facts pertaining to the transcript issue are indisputable. In September 2005, HPD did not follow the clear requirements of the law concerning the preparation and settlement of the transcript. HPD did

not give petitioners the mandated 15-day window of opportunity to review the incomplete transcript and the hearing officer's summary of the missing first half and propose amendments or corrections, as required by CPLR § 5525(c). The lower court judge noted in her decision that HPD both *obtained* the summary and *filed it in court* on or about September 22, 2005 (see A-15, last sentence, and A-16, first sentence). In their appellate brief, petitioners attested that they only had 2 days to propose amendments or corrections before the incomplete transcript and unstipulated to summary were filed in court by HPD (A-39, last paragraph, to A-40, first paragraph). The Record on Review submitted to the Appellate court, with time and date stamps on the fax'd summary and HPD's signature and date on its verified answer, bear these facts out.

HPD could not file a "certified transcript" because no stenographic record of the hearing was made. The public body could not file a "verbatim record" of the hearing and fulfill its legal mandate under CPLR § 7804(e) because half of the tape-recorded testimony was lost due to its own negligence. HPD then asked the hearing officer to make a summary of the lost testimony from her handwritten notes. But, a hearing officer's notes of a proceeding is deficient for a fair review as a matter of law and courts have ruled such notes inadmissible and ordered a new hearing (A-26 to A-27).

Petitioners' due process rights were denied because HPD violated CPLR §§ 7804(e), 5525(c) and 5526. HPD never corrected or settled the transcript

prior to filing it in court, and did not bring the matter to the attention of the judge as the law required.

2. The Lower Court's Failure to Rule

Petitioners timely and properly raised the federal question of due process in the court of first instance. In Kings County Supreme Court, in accordance with CPLR §§ 7803(1) and 7804(f), they maintained HPD failed to perform a duty enjoined upon it by law and objected in point of law to HPD's filing of the legally deficient transcript (A-22 to A-26). This was a new matter contained in HPD's answer and petitioners raised the issue because it could terminate the proceeding. If it is true that the transcript was legally deficient, this perforce precludes a fair review and the court would have to annul the HPD determination and remand the case for a new hearing.

The court of first instance failed to carry out its mandate under CPLR § 7804(g). The statute clearly required the court to first dispose of the objection properly raised that could terminate the proceeding. Sadly, the court did not do so. In her Decision and Order, the judge herself refers to this statute and its requirements, and notes that petitioners "urge this Court to address certain matters of law which they contend could be dispositive . . ." (A-18, second paragraph). However, the judge erroneously framed the transcript problem as a "substantial evidence" issue, rather than an "unlawful filing" issue as petitioners properly had argued (A-19, second paragraph).

Petitioners were denied due process--their right to a decision on the admissibility of the deficient tran-

script and the right to a new hearing--when the lower court simply transferred the case to the Appellate court. The judge eschewed the matter stated plainly in the pleadings, failed to do what CPLR § 7804(g) required, and wrought an injustice upon petitioners. This is all the more egregious since the lower court judge, based on her written decision, clearly understood what petitioners were *asking* the court to do and what the law *required* the court to do.

3. The Appellate Court's Unlawful Review

Petitioners timely and properly raised the federal question of due process again in the Appellate Division of Kings County Supreme Court. In their Brief, they argued at length that existing case law required the Court to order a new hearing because the legally deficient transcript was filed without petitioners' corrections, the missing portion is so great as to make impossible a fair review, and review would necessarily prejudice petitioners (A-33 to A-44).

The Appellate court did not answer the question, as they had an obligation to do under CPLR § 7803 (1), of whether HPD denied petitioners due process by failing to perform a duty enjoined upon it by law (A-39 to A-40). The court did not comment on the "unlawful filing" issue regarding the transcript, as petitioners had argued, which could have terminated the proceeding. Instead, the transcript problem was considered as a "substantial evidence" issue, and the court ruled against petitioners (A-5).

The Appellate court's decision denied petitioners due process by denying them a fair review. The mis-

sing portion of the transcript certainly did warrant an annulment of the eviction order. The judges did not follow the clear mandate in CPLR § 7804(g) and knew HPD violated §§ 5525(c) and 5526. The court could not possibly undertake a meaningful review under the substantial evidence standard as stated in § 7803(4). There was no entire record or corrected transcript before the judges' eyes.

REASONS FOR GRANTING THE WRIT

This Court has long recognized a strong federal policy of supporting administrative hearings by government agencies as a means to adjudicate the many issues and conflicts that arise in modern society over the distribution of public benefits or services. The Administrative Procedure Act ("APA"), 5 USC § 551 *et seq.*, was passed in 1946 to regulate the growing number of agency determinations made by administrative law judges. The APA authorizes suit by a person suffering legal wrong because of a federal agency's action or is adversely affected or aggrieved by an agency's failure to act. States have passed their own laws, modeled after the APA, governing the procedures to be used in administrative hearings and to be used in court for challenges to agency determinations.

Under the APA, 5 USC § 706, standards are outlined governing judicial review of an agency's "findings of fact" in an administrative hearing. A reviewing court, under §§ 556 and 557, has the authority to hold unlawful and set aside agency findings found to be arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.

A critical feature of the APA is the necessity of a "complete record." Under § 706, it states that "the court shall review the whole record . . . and due account of it shall be taken of the rule of procedural error." Under § 556(e) we learn "The transcript of the testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . " The significance of the record for judicial review is apparent in § 557 which decrees that "The record shall show the ruling on each finding, conclusion, or exception presented."

New York's CPLR § 7800 *et seq.* ("Article 78") is the administrative procedure law governing judicial review of fact-finding decisions made by state and local agencies. Petitioners allege they were denied due process (1) by the city agency HPD which violated the mandates of § 7804(e), as well as §§ 5525(c) and 5526, by not filing a complete record of the hearing held to evict them from their apartment, (2) by the court of first review which violated § 7804(g) in failing to rule on the admissibility of the half-transcript that could have terminated the proceeding, and (3) by the Appellate court which violated § 7803 (4) by reviewing the half-transcript under the substantial evidence standard when the law required a review on the entire record.

These violations of state law parallel violations of federal law under the APA. Contrary to 5 USC §§ 556(e) and 557(c)(3), HPD did not file the transcript of testimony to constitute the whole record. The lower court in New York, notwithstanding § 706(2)(D),

did not set aside HPD's action because it was "without observance of procedure required by law." The New York Appellate court, despite §§ 556 and 706, did not "review the whole record."

Petitioners' appeal thus stands at the forefront of the whole system of administrative justice reviewed by state and federal courts. **This case deals with the necessity of a "whole record" for the court to review and whether there was "substantial evidence" in the record to support an agency's determination.** These issues are extremely important questions of federal law because they affect the outcome of thousands of cases filed every year.

The following are the most compelling reasons why this Court should grant this writ of certiorari to the Appellate Division, Second Department, Supreme Court of New York, and to consider a reversal without a further hearing on the merits.

A. The New York Appellate Decision Is Based on a Substantial Evidence Standard that the APA Invalidated in 1946.

The "substantial evidence" standard referred to by the Appellate judges as the basis of their decision has been around for almost a century. The term first appeared in the Federal Trade Commission Act of 1914. The substantial evidence standard was later incorporated into other federal legislation as a rule by which courts should review administrative determinations. This Court as early as 1938 defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619 (1966). As the term evolved, it came to mean "something less than the weight of the evidence." *Foust v. Lujan*, 942 F.2d 712, 714 (1991). The substantial evidence standard has been a basic threshold test for judicial review. *Dickinson v. Zurko*, 119 S.Ct. 1816 (1999).

Before passage of the APA, the courts developed an extremely narrow view of the substantial evidence rule. Any reasonable evidence that tended to support the challenged administrative decision was accepted by the courts. In practice, this application of the substantial evidence rule meant that if the evidence presented for review was only one side of a case, or a fraction of the whole record, the reviewing court was obligated to honor the agency's right to use one-sided evidence to support its conclusion. (See, e.g. Kenneth F. Warren, *Administrative Law in the Political System*, Perseus Publishers, 2004, pp. 436-438.)

The APA framers decided to do away with this one-sided substantial evidence test. In 5 USC § 706 (2), they made certain the courts would have to apply the substantial evidence rule in light of the *whole* record. Until 1946, the courts were not compelled to judge whether the facts of the case, taken as a whole, would lead a reasonable person to conclude that substantial evidence exists. Until 1946, the courts did not have to consider all contrary evidence in the record to support the agency's conclusion. Five years later, this Court laid out the meaning and signifi-

cance of the "whole record" requirement in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

B. The New York Appellate Decision Conflicts with Post-APA Rulings from This Court and Other Federal Courts.

From 1951 to the present, this Court *continued* to uphold the principle that the entire record of a proceeding must be considered when deciding if there was substantial evidence to support an administrative determination. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Udall v. Federal Power Commission et al.*, 387 U.S. 428 (1967); *Citizens to Preserve Overton Park, Inc., et al., v. Volpe*, 401 U.S. 402 (1971); *Steadman v. SEC*, 450 U.S. 91 (1981); *Bowen et al. v. Massachusetts*, 487 U.S. 879 (1988); *Marsh et al. v. Oregon Natural Resources Council et al.*, 490 U.S. 360 (1989); *Director, Department of Labor v. Maher Terminals, Inc., et al.*, 512 U.S. 267 (1994). *Ballard, et ux., v. Commissioner of Internal Revenue*, 544 U.S. 40 (2005).

Other federal courts reiterated and applied this post-APA whole-record standard as well. *Stoliaroff v. Ribicoff*, 198 F. Supp. 587 (1961); *Rechany v. Roland*, 235 F. Supp. 79 (1964); *Collette Travel Service, Inc. v. United States*, 263 F. Supp. 302 (1966); *Pandrol USA, LP v. Airboss Railway Products, Inc. et al.*, 320 F.3d 1354 (2003). In *Wood v. Commissioner of Social Security*, U.S. Dist. (N.D.N.Y.), LEXIS 1474 (2003), the court wrote: "To determine on appeal whether an administrative law judge's findings are supported by substantial evidence, a reviewing court considers the whole record, examining the evidence

from both sides . . . ." In *Donastorg v. Government Employees' Service Com.*, 285 F. Supp. 111 (1968), it was noted that the very concept of review implies review of "totality of proceedings" and if an agency fails to transcribe administrative hearings it risks remand. And in *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1545, 1548 (1993), the court pointed out that the "whole record" includes everything that was before the agency pertaining to the merits of the decision, and that if the record is not complete then the requirement that the agency decision be supported by "the record" becomes almost meaningless.

The U.S. Court of Appeals for the Second Circuit, in a case controlling for New York, vacated and remanded based upon an incomplete and inadequate record. *Pratts v. Chater*, 94 F.3d 34 (1996). Likewise, the U.S. District Court (S.D.N.Y.), in *Ornellas v. Chater*, 1996 U.S. Dist. LEXIS 13948, ordered a new hearing because the "transcript was extremely difficult to follow."

The spirit and letter of the APA whole-record rule is embodied in CPLR §§ 7803(4), 7804(e), 5525, and 5526. The decision by the New York Appellate court in this case patently undermines both state and federal law regarding the current substantial evidence standard and this Court's rulings on the matter. By stating that (1) the missing portion of the hearing transcript does *not* warrant an annulment and (2) a meaningful review of the administrative determination under the substantial evidence standard was possible based upon the *available testimony* (A-5), **the New York judges in effect applied antiqua-**

ted statutory and case law repudiated by the APA in 1946, and upheld in numerous federal cases since, to a determination by a city agency rendered in 2005.

The Appellate decision is erroneous, offensive, and clearly violative of due process and fair play in light of the statutory definition and requirement of the substantial evidence standard the judges stated they used to review respondent HPD's decision. The court could not possibly have considered the "whole record" and could not possibly have examined the "evidence from both sides" with half the transcript of the hearing missing. What "reasonable mind" might accept as adequate an eviction decision without a review the landlord's evidence against the tenants? How could the panel of judges have rendered due process and given petitioners a meaningful review if an outmoded 60-year-old standard of law was utilized? The New York court departed so far from the accepted and usual course of current judicial review of administrative determinations as to call for an exercise of this Court's supervisory power to correct the flagrant wrong that has been committed against petitioners.

C. The New York Appellate Decision Is Not Supported by Its Own Citations.

Astoundingly, the Appellate court's decision that a transcript with the first half missing is still reviewable is not even supported by its own citations. In *Matter of Sledge v. Sledge*, 228 A.D.2d 310 (1996), only one-eighth of the transcript was missing. In *Matter of Peterkin v. Reid*, 105 A.D.2d 707 (1984), the problem was merely "isolated unintelligible parts" in

the hearing record. These cases, with small amounts of material missing, do not compare with this case where a whopping 50 percent of the record was lost.

The Appellate court's decision that there was substantial evidence in the record for the administrative determination is also not supported. The statutory citations are undermined by the fact that there was no substantial evidence against petitioners in the second half of the transcript, and the missing first half contained testimonial evidence that would have negated what the court "read into" the second half. In one of the two cases cited, *In re Shi Yi Tang v. New York City Dept. of Hous. Preserv. & Dev.*, 29 A.D.3d 470 (2006), the facts pertaining to the residency of the tenant and occupant who were evicted are very different than the facts in the instant case. The other case cited, *Matter of Estate of Vaisman v. East Midtown Plaza Hous. Co.*, 15 A.D.3d 290 (2005), cannot be compared here because that court, unlike the one for *Shi Yi Tang*, provided no specific facts concerning primary residence or family relationship. The Appellate court cited a case that, in its published form, gives no clue as to how it relates to petitioners' case.

D. The New York Appellate Decision Conflicts with Prior Decisions from Its Own Second Judicial Department.

Ironically, the Appellate decision is in conflict with a decision in another case handed down just a week earlier in the same Department. In *Matter of Bradley Corporate Park v. Crotty et al.*, 39 A.D. 3d 632 (2007), the four justices, one a member of petitioners'

panel, stated: "Determining whether substantial evidence exists requires a reviewing court to look at the entire record before the administrative agency . . . ." The *Bradley* panel cited two cases to support its view. *Matter of Furey v. County of Suffolk*, 105 A.D. 2d 41 (1984) and *Matter of Paulsen v. Catherwood*, 27 A.D. 2d 493 (1967). Decisions were reversed, administrative determinations annulled, and the matter remitted for further proceedings because of "inadequacies" of the records. The transcript in this case, with a 50 percent gap, surely was inadequate. Petitioners wish their panel had followed the line of reasoning of the *Bradley* panel.

The Appellate decision in this case is in conflict with a number of other decisions handed down over the years by the same Second Department in civil and criminal cases involving missing parts to a transcript. As in *Furey* and *Paulsen*, the decisions were reversed and a new trial or hearing ordered. *People v. Jacobs*, 286 A.D. 2d 404 (2001); *People v. Wilson*, 182 A.D.2d 734 (1992); *People v. Laracuente*, 136 A.D.2d 742 (1988); *Santiago v. Blum*, 75 A.D.2d 596 (1980); *Matter of Robinson v. Blum*, 73 A.D.2d 691 (1979); *People v. Mincey*, 64 A.D.2d 615 (1978); *Matter of Anderson v. Toia*, 59 A.D.2d 1024 (1977); *Matter of Halley v. Lavine*, 47 A.D.2d 945 (1975); *S. Teper & Sons, Inc. v. Zschaler et al.*, 24 A.D.2d 1028 (1965).

Moreover, in still other cases, the Second Department reversed decisions because, as in this case, the record could not be accurately reconstructed. *People v. Cameron*, 219 A.D.2d 662 (1995); *People v. Hall*, 200 A.D.2d 474 (1994). The Second Department also

reversed because, as petitioners argued, it was an error to permit someone who was a participant in the recorded conversation to prepare the transcript (A-26 to A-27). *People v. Wilson*, 182 A.D.2d 734 (1992); *People v. Colon*, 87 A.D. 2d 826 (1982); *People v. Mincey*, 64 A.D.2d 615 (1978). Why petitioners' Appellate panel failed to follow precedents from the many different cases in its own department is anyone's guess.

The Appellate decision under appeal here is in conflict with a number of Second Department panels that interpreted the requirements of CPLR § 5525. *Brandenburg v. Brandenburg*, 188 A.D.2d 368 (1992); *Personnel Systems Inter. v. Gray*, 146 A.D.2d 831 (1989); *Matter of Conklin v. Rogers*, 98 A.D.2d 918 (1983); *Wahrhaftig et al. v. Space Design Group*, 28 A.D.2d 940 (1967). These cases affirmed the right of an appellant to a settlement of the record, the duty of the trial judge to settle the transcript problem, and the right to a reversal and a new trial if the record could not be reconstructed and a meaningful review was not possible. In other cases, the same conclusions were reached albeit without specific reference to CPLR § 5525. *Matter of Jordal v. Jordal*, 193 A.D.2d 1102 (1993); *People of the State of New York v. Flynn*, 53 A.D.2d 816 (1976); *Esposito et al., v. Herrschaft*, 13 A.D.2d 656 (1961).

E. The New York Appellate Decision Conflicts with Prior Decisions of Other Departments.

The Appellate decision in this case is in conflict with prior decisions from all three other judicial departments in New York State. The First Department

in two cases unanimously reversed because of an incomplete transcript or lack of a whole record. *Matter of Bolden v. Bolden*, 29 A.D.2d 520 (1967); *Phinn v. Kross*, 8 A.D.2d 132 (1959). The Third Department in *Matter of Ernest LL v. Rosemary LL*, 50 A.D.2d 706 (1975) reversed a trial court's judgment because the record contained numerous errors, omissions, and deficiencies and the parties could not agree on corrections. The court said that meaningful appellate review was impossible. *In re Claim of Palmer v. Rescue Mission Alliance of Syracuse, Inc.*, 273 A.D. 2d 525 (2000) was remitted for a second hearing because of an incomplete recording of the first hearing. In the Fourth Department, decisions were reversed because of numerous instances of unintelligible parts in the transcript or substantial parts missing. *Matter of Sullivan v. Buscaglia*, 75 A.D.2d 990 (1980); *People v. Auth*, 43 A.D. 2d 790 (1973).

A reversal and new trial ordered in a case almost a century old, *Huie v. Devore,* 138 A.D. 677 (1910), due to an insufficient transcript underscores the point that the 2007 Appellate decision against petitioners is historically out of line.

F. The New York Appellate Decision Conflicts with Prior Decisions of New York's Highest Court.

The Court of Appeals is the highest court in the State of New York. In a number of cases, it made decisions the Appellate Division, Second Department, below it should have followed in this case. Decisions were reversed and new trials or hearings ordered because transcript parts or jury instructions were in-

complete, missing, or unobtainable and meaningful review was impossible. *Matter of Sabol v. Perales*, 82 N.Y.2d 685 (1993); *People v. Coleman*, 81 N.Y.2d 826 (1993); *People v. Owens and Boon*, 69 N.Y.2d 585 (1987); *People v. Savino*, 44 N.Y.2d 669 (1978); *People of the State of New York v. Glass*, 43 N.Y.2d 283 (1977); *People v. Rivera*, 39 N.Y.2d 519 (1976).

In *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 N.Y.2d 176 (1978), New York's highest court set a policy the Appellate court might well have read. The judges said "the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision."

G. The New York Appellate Decision Sets a Dangerous Precedent.

There is no law, federal or state, supporting the Appellate decision. Using the Lexis-Nexis legal reference system, petitioners could find no case in any jurisdiction in which a transcript with a 50 percent (or sizable) gap was deemed reviewable. On the contrary, as citations in Sections B to F have shown, **the extant federal and state case law indicates that a transcript with a significant amount of parts missing must be declared unreviewable by a court and a new hearing ordered**.

If the Appellate decision is allowed to stand, then this case, now law, would contradict the statutory requisites of CPLR § 5525. An appellant's right to a settlement of the record, the duty of the trial judge to resolve the transcript problem, and the right to a re-

versal if the record cannot be reconstructed would all be threatened. CPLR § 7804(e) may have to be re-written. It might not be necessary any longer for a hearing officer to file a verbatim transcript of the proceedings. His/her summary notes, unstipulated to by the respondent, could suffice for the reviewing court. And CPLR § 7803(4) would lose meaning. No longer would it be necessary for a determination made as a result of a hearing to be supported by evidence on the entire record. A transcript of the first half of a proceeding, or the second half, minus the other, could be the new standard for judicial review and confirmation.

If this Court denies certiorari or fails to reverse the Appellate decision, then added to New York case law would be a ruling that goes down a new and perilous path. Half a transcript, even with critical parts missing, would be worthy of review in any court of law in the state. Government agencies and hearing officers would not have to be so careful with their recording devices and techniques. Administrative determinations against public housing tenants, welfare recipients, unemployment claimants, non-custodial fathers, expelled students, terminated workers, prison inmates, mental hospital patients, suspended teachers, disbarred lawyers, de-licensed doctors, etc., would escape the close scrutiny now required by law. Those who perceive they have been wronged by government agencies but choose to exercise their right to a judicial review will be "short-changed" by the courts.

Perhaps the consequence of the Appellate Division decision in this case that is most apparent, not to

mention ominous, is that it gives public bodies empowered to conduct administrative hearings against private citizens a "license for electronic negligence."

H. The New York Appellate Decision Is a Rank Injustice and a Second Opinion Is Needed.

This Court has a long tradition of granting writs of certiorari for appeals dealing with challenges to the due process protections of the APA. *Miller et al. v. Brand et al.*, 128 S. Ct. 650 (2007); *Dickinson v. Zurko et al.*, 527 U.S. 150 (1999); *Allentown Mack Sales and Service v. National Labor Relations Board*, 522 U.S. 359 (1997). The due process questions presented in this appeal are quite significant, even though the consequences of the decision challenged seem minor, the rights of two persons to continue living in an apartment occupied for almost thirty years. The Appellate court's ruling affects thousands of cases in New York State alone. This Court should grant the writ, as it did in *Thompson v. City of Louisville et al.*, 362 U.S. 199 (1960), and make a ruling that will affect countess more cases in other state courts and federal courts.

Each year, tens of thousands of cases involving landlord-tenant issues, child custody, unemployment insurance, social security benefits, employee terminations, workers' compensation, mental patients' rights, prison inmate grievances, etc., are heard outside of court. Central to state laws governing administrative hearings is the right to appeal an adverse determination in court, and the right to have the reveiwing court look at a complete record of the hearing. This Court has a compelling interest in seeing

to it that state courts do not compromise the transcript requirements of the law and thus deny appellants a fair review as a matter of due process.

It is up to this Court, the highest court in the land, to overturn decisions from lower courts that are contrary to long-standing rulings in previous state and federal cases. This Court has an obligation to strike down decisions that threaten fundamental rights of due process affecting every citizen. By granting the writ, it can not only correct an egregious injustice, it can answer troubling questions as well. For example, at what point does an incomplete transcript become "unreviewable" because of its missing parts? If a court reviews an unreviewable transcript, is this a denial of due process? What constitutes substantial evidence in light of a transcript with missing parts of a hearing's testimony? Can a state or federal court today employ a standard of review that had been discredited and revised sixty years earlier by this country's highest authority? If the decision of a state appellate court contradicts the decisions on a similar issue of every other state or federal court, shouldn't this decision be summarily reversed?

This case sorely needs a second opinion, and this Court is the only body that can render it. Petitioners tried three times to get the Court of Appeals in New York to take this case and failed. They made solid factual and legal arguments for that court to review the Appellate decision as of right on constitutional grounds, on Motion for Leave to Appeal, and on Motion for Reargument of Leave to Appeal but to no avail. Perhaps petitioners' *pro se* status on appeal to Albany influenced the three denials.

SUMMARY DISPOSITION ON THE MERITS

Rule 16.1 of the *Rules of the Supreme Court of the United States* authorizes this Court to make a summary disposition on the merits in this case without a further hearing. Petitioners maintain that the case and statutory law cited and argued here are so overwhelmingly against the New York Appellate decision that a hearing by way of either briefing or oral argument is unnecessary. Petitioners respectfully request that this Court issue an order reversing the New York Appellate Division's decision. Increasingly in recent years, this Court has granted certiorari and summarily reversed without a further hearing on the merits (Herbert Monte Levy, *How to Handle an Appeal*, Practicing Law Institute, 2002, p. 12-21).

Summary reversal is justified in this case. There is no need for the parties to file wordy briefs and to stand before the nine justices and spout facts, circumstances, legal statutes, and case law already part of the pleadings filed in this Court. What could respondents possibly say in their opposition papers and oral arguments to ward off reversal? Respondents can't claim the HPD hearing officer's summary of the testimony on the blank tape made the record whole. It would be foolish for respondents to state the law permitted HPD to file an incomplete transcript without petitioners' approval or corrections. Respondents can't argue HPD did not have an obligation to bring the transcript problem to the attention of the lower-court judge for settlement. They can't maintain the lower-court judge did not have to rule on the transcript issue which could have terminated the proceeding. Attorneys for HPD and Cadman can't cite

any law which would permit the Appellate court to review an administrative determination with only half a transcript of the hearing. Respondents can't point to any case that would authorize the Appellate court to review an administrative determination under the substantial evidence standard that existed prior to the passage of the APA in 1946.

In short, there is no state statute or legal case that respondents can cite by word or mouth that would countervail the arguments petitioners presented in this document.

This case is a travesty of justice. The facts concerning the legal wrongs committed by government attorneys and judges are shocking to the sensibilities of anyone concerned with the proper functioning of our judicial system. First, attorneys for a city agency fail to follow proper legal procedures in the filing of a faulty transcript of an administrative hearing. Then, the lower court judge reviewing the agency's determination, after the transcript issue was properly raised in court, fails to remand the case for a new hearing in spite of the clear mandate in the law to do so. And finally, an appellate panel of four judges chooses not to review the case according to current legal standards that were properly raised in court, standards upheld by this and other federal courts since 1951, but instead rules on the transcript issue in terms of the pre-1946 legal standard. **If state attorneys are breaking the law and judges are not ruling on the violations or are judging a case by outdated and invalid standards, then where can a person go to obtain justice?**

PRAYER FOR RELIEF

Petitioners pray the learned justices of this Court will read the arguments contained in this petition carefully, will give the *pro se* litigants some measure of respect they give members of the bar, and will render a decision that protects the legal rights of countless numbers of Americans who are (1) threatened by the growing bureaucratization of legal justice in our society and (2) disadvantaged by the unwillingness of state appeals courts to review cases such as this.

Respectfully submitted,

Raymond M. Weinstein JB

RAYMOND M. WEINSTEIN
and JOHN BARRY
Petitioners Pro Se

101 Clark Street
Apartment 18A
Brooklyn, NY 11201

May 2, 2008

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of February 2008.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 1347

In the Matter of Raymond M. Weinstein et al.,

Appellants,

v.

City of New York Department of Housing Preservation and Development et al.,

Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herewith, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of October 2007.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

2-10 Mo. No. 959
In the Matter of Raymond M. Weinstein et al.,
Appellants,
v.
City of New York Department of Housing Preservation and Development et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of July 2007.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 787 SSD 38
In the Matter of Raymond M. Weinstein et al.,
Appellants,
v.
City of New York Department of Housing Preservation and Development et al.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court and *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

s/ Marjorie S. McCoy
Marjorie S. McCoy
Deputy Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

D14753
G/hu

39 AD3d 764 Argued – March 6, 2007

HOWARD MILLER, J.P.
WILLIAM F. MASTRO
DAVID S. RITTER
RUTH C. BALKIN, JJ.

2006-02131 DECISION AND JUDGMENT

In the Matter of Raymond M. Weinstein, et al., petitioners, v City of New York Department of Housing Preservation and Development, et al., respondents.

(Index No. 21896/05)

Goldberg, Scudieri, Lindenberg & Block, P.C., New York, N.Y. (David Scudieri of counsel, for petitioners.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers and Norman Corenthal of counsel), for respondent City of New York Department of Housing Preservation and Development.

Breier Deutschmeister Urban & Fromme, P.C., New York, N.Y. (Miriam M. Breier of counsel), for respondent Cadman Towers, Inc. (no brief filed).

Proceeding pursuant to CPLR article 78 to review a determination of the City of New York Department of Housing Preservation and Development dated March 23, 2005, which, after a hearing, granted the application of Cadman Towers, Inc., for a certificate authorizing it to proceed with a proceeding to evict the petitioners.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed, on the merits, with costs payable to the respondent City of New York Department of Housing Preservation and Development.

There is no merit to the petitioners' contention that the missing portion of the hearing transcript warrants an annulment of the administrative determination. This court is able to undertake a meaningful review of the administrative determination under the substantial evidence standard based upon the available testimony and the documentary evidence (*see Matter of Sledge v Sledge*, 228 AD2d 310; *Matter of Peterkin v Reid*, 105 AD2d 707). Moreover, there is substantial evidence in the record to support the determination of the respondent City of New York Department of Housing Preservation and Development that the petitioners were subject to eviction from the subsidized apartment they occupied (*see* 28 RCNY § 3-02[n][4]; 28 RCNY § 3-02[p][2][(ii]; 28 RCNY § 3-02 [p][3-4]; *Matter of Shi Yi Jang v. New York City Dept.*

of Hous. Preserv. & Dev., 29 AD3d 470; *Matter of Estate of Vaisman v East Midtown Plaza Hous. Co.*, 15 AD3d 290).

The petitioners' remaining contentions are without merit.

MILLER, J.P., MASTRO, RITTER and BALKIN, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

April 17, 2007

MATTER OF WEINSTEIN v CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

At an IAS Term, Part 19, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of February, 2006.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

In the Matter of

RAYMOND M. WEINSTEIN, et ano.,
Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

THE CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, ET ANO.,
Respondents.

The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2,3

Reply Affidavits (Affirmations)	4
Sur-reply Affidavit (Affirmation)	5

Upon the foregoing papers, petitioners Raymond M. Weinstein and John Barry seek a judgment, pursuant to Article 78 of the CPLR, (1) vacating, annulling and setting aside a decision and Certificate of Eviction issued by respondent City of New York Department of Housing Preservation and Development (HPD) on March 23, 2005, and (2) staying respondent Cadman Towers, Inc. (Cadman Towers) from seeking to enforce the Certificate of Eviction by summary eviction proceeding or otherwise.

Factual Background

Respondent HPD is the City's supervising Agency for Limited-Profit Housing Companies.[1] Respondent Cadman Towers is a Limited-Profit Housing Company, organized in accordance with Articles II and IV of the Private Housing Financce Law, also known as the Mitchell-Lama Law. Cadman Towers is the owner and manager of a Mitchell-Lama operated building at 101 Clark Street in Brooklyn.

Petitioner John Barry is a cooperator and co-tenant of record of apartment 18A at 101 Clark Street in Brooklyn. The only other cooperator and/or tenant of record was John J. Holub, now deceased. Barry and Holub were registered domestic partners. Holub was the original co-operator in 1979 and was joined in

[1] Title 28, Chapter 3 of the Rules of the City of New York (RCNY).

occupancy by Barry in 1995. It is conceded that Barry and Holub were co-operators entitled to possession pursuant to a written occupancy agreement.

In 1994, Holub suffered a stroke. In 1998, Barry and Holub purchased an apartment in California, but purported to maintain their New York residency.

In November 1999, petitioner Raymond M. Weinstein moved into the subject apartment. Weinstein was thereafter listed (from 1999 to 2002) as a "friend" and (in 2003) as Barry's "father" on annual income recertifications completed by Barry and Holub and required under the Mitchell-Lama laws to establish eligibility for continued occupancy. Weinstein was, however, at all times relevant, employed by the University of South Carolina (Aiken) as a full-time professor and maintained a residence in that state. It appears that for 1999 through 2003, Mr. Weinstein filed tax returns in New York, South Carolina and Georgia.

In 2001, Weinstein petitioned the Kings County Family Court to adopt Barry. An order of adoption was signed by a judge of that court on May 15, 2003. According to the adoption order, Barry was born on July 22, 1948 and was 54 years old at the time he was adopted by Weinstein. Holub, according to the record, was 66 years old in May 2003.

Pursuant to 28 RCNY 3-02, *et seq.*,[2] a Mitchell-

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[2] The acts or incidents in question all occurred in or subsequent to 2003, and the parties do not assert that the January 2003 amendments to 28 RCNY 3-03 *et seq.*, are not applicable

Lama tenant/cooperator: must initially occupy and then maintain the apartment as his or her primary residence by, *inter alia*, occupying the dwelling unit for one hundred eighty three (183) or more days during the preceding calendar year; has no right to assign the unit and may not sublet without HPD's prior written approval; and may not accept "any consideration or thing of value from a guest, invitee or other occupant in exchange for occupancy, whether temporary or permanent, unless such person is listed on the application, income affidavit or recertification of the tenant/cooperator and the tenant/cooperator continues to maintain the apartment as his or her primary residence."

In or about or prior to March 2004, Cadman Towers discovered that Barry and Holub may have violated one or more covenants or obligations of the occupancy agreement by failing to maintain the unit as their primary residence and by allegedly accepting monetary or other consideration from Weinstein in exchange for his (also part-time) occupancy of the unit (*i.e.*, illegally subletting the unit to Weinstein for valuable consideration).

In March 2004, Cadman Towers served upon Holub and petitioners a "Preliminary Notice of Grounds for Eviction," dated March 4, 2004, and a "Notice of Hearing," dated March 9, 2004 stating that Holub and petitioners were in substantial violation and/or default of the terms of the Occupancy Agreement and that their failure to cure these violations by March 24, 2004 would result in Cadman Towers' application

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here.

to the HPD for a Certificate of Eviction.

Specifically, the March 2004 notices accused Holub and Barry of failing to occupy the dwelling unit as their primary residence in 2003, maintaining a primary residence in California during that period and subletting or assigning their rights of occupancy to the subject apartment to Weinstein for valuable consideration, without permission of HPD or the landlord and in violation of the occupancy agreement. Said notices also advised Holub and petitioners that Cadman Towers had requested a hearing before an HPD Hearing Officer for the purpose of obtaining a certificate of eviction and that such a hearing had been scheduled for March 29, 2004.

According to respondents, petitioners failed to cure the violations by March 24, 2004 and/or said violations were non-curable.

The Administrative Hearing and Decision

A pre-hearing conference was held on March 29, 2004 in connection with Cadman Towers' petition for a certificate of eviction and hearing, before administrative hearing officer Frances Lippa (H.O. Lippa).

In their March 29, 2004 response to the preliminary eviction and hearing notices, petitioners and Holub did not to assert that they occupied the unit in 2003 for, or more than, 183 calendar days, but otherwise generally or specifically denied Cadman Towers' allegations, including Cadman Towers' assertion that Holub and Barry's alleged "family member" Weinstein, did not maintain the unit as his primary resi-

dence. Holub and Barry contended that Mr. Holub's health necessitated their residency in a warmer climate for the eight months in 2003 that they were not in occupancy in Brooklyn.

A hearing was scheduled for May 6, 2004, but was adjourned upon Holub and petitioners' request. The hearing was held on June 8 and continued on September 21, 2004, before H.O. Lippa, and was attended by counsel for Cadman Towers and three Cadman Towers representatives and/or witnesses, and by Holub and petitioners, who were also represented by counsel.

On June 8, 2004, Cadman Towers presented documentary and testimonial evidence of property manager Luis Pineda, lobby attendant Ronald Williams, and Robert Leudesdorf, a licensed private investigator. Such testimony was the subject of cross-examination by petitioners and Holub's counsel. At the June 8, 2004 hearing, Holub and petitioners presented their own documentary evicence and Barry's testimony. Holub and Weinstein testified during the September 21, 2004 proceedings, and the hearing was concluded on that date.

After considering the testimony and other evidence adduced at the hearing, H.O. Lippa concluded that said evidence warranted the issuance of a certificate of eviction and she issued such certificate, thereby authorizing Cadman Towers to commence eviction proceedings to terminate the tenancy and occupancy of petitioners and Holub. In her March 23, 2005 written decision, H.O. Lippa noted that there is no dispute and no question that Barry and Holub pur-

chased an apartment in California, that they spent approximately eight months in California and four months in New York in 2003 and in prior years, and that neither Holub nor Barry spent 183 days in the apartment in 2003.

H.O. Lippa further noted that: (1) Barry and Holub's "failure to spend 183 days in the apartment is a factor in determining whether the subject apartment is their primary residence"; (2) there is no evidence that Holub's medical condition and need to avoid New York's temperature extremes "is a temporary situation, or that it will abate"; and (3) although Holub and Barry continued to file New York tax returns, Barry served on a jury in New York in 2003 and Holub is registered to vote in New York, (a) Holub admitted to Leudesdorf during a subterfuge telephone conversation that he was a resident of California, (b) Holub and Barry's car was registered and kept in California, (c) their bank statements showed purchases, all of which were made in California, (d) all of their 2002 and January and February 2003 MCI telephone bills for the subject apartment were sent to them in California and, only beginning in March 2003, to the subject apartment, and (e) Barry's Citibank statements for 2003 and 2004 were not addressed to the New York apartment and his testimony that it was the bank which independently determined to send those statements to the California address, and other testimony, was not credible.

As to Weinstein, H.O. Lippa determined that he had no occupancy rights to the subject apartment unit since, although "he may have created a paper record reflecting the subject apartment [and New

York] as his address," Weinstein's testimony regarding his co-residency with Barry and Holub was not "credible," and there was no evidence of his having resided in the apartment with Holub and Barry, or his having resided in the apartment as his primary residence.

H.O. Lippa noted that the hearing evidence demonstrated that Weinstein maintained a residence in South Carolina and was a full time professor at the University of South Carolina, teaching classes in the fall, spring and summer semesters. She noted the absence of Weinstein's personal calendar, diary, travel documentation or any other evidence supporting his "assertion that he spends 183 days in the apartment each year" or any "credible evidence that [he] ever resided in the apartment with [Holub and Barry]."

While expressing her concern for Holub's health issues, H.O. Lippa further noted that "[t]his apartment is a Mitchell-Lama subsidized apartment[;] [ ] the HPD rules require that the shareholders reside there as their primary residence, and not use the apartment like a hotel"; and that Holub, Barry and Weinstein "do not reside in the subject apartment together [and] [i]n fact, all three of them use the apartment like a hotel, and not a primary residence, in violation of the HPD rules."

H.O. Lippa concluded, in her March 23, 2005 decision, that Holub and Barry do not reside in the subject apartment as their primary residence and that Weinstein is not entitled to occupancy rights in

the apartment, and issued a certificate of eviction as against all three.

Procedural History

Petitioners[3] commenced the instant proceeding to challenge the March 23, 2005 administrative determination on or about July 2005.

28 RCNY 3-18(b) requires that a tape recording be made by the hearing officer of an administrative hearing at which a certificate of eviction is sought. In August 2005, prior to serving its answer, HPD discovered that the first of two audiotape recordings of the hearing (the tape of the June 8, 2004 date, during which respondents' three witnesses and Barry testified) had failed to record.

HPD, through its counsel, notified petitioners' present counsel of the recording failure, and offered to: (1) remand the matter for a new hearing to reconstruct the missing portions of the testimony; (2) in place of a transcript, obtain and rely upon the hearing officer's summary of the proceedings, as recreated from her notes; or (3) stipulate as to the contents of the testimony. Two or more weeks passed without a response from petitioners' counsel as to how petitioners wished to proceed with the matter. HPD therefore requested that the hearing officer prepare a summary of the June 8, 2004 proceedings based upon her notes and recollection, and obtained such a summary on or about September 22, 2005.

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[3] Holub died in California on March 21, 2005, two days prior to H.O. Lippa's decision.

On or about September 22, 2005, HPD served its verified answer to the petition. Annexed as an exhibit to said answer was H.O. Lippa's 11-page summary of the june 8, 2004 proceedings, affirmed by her under penalty of perjury.

At the same time, Cadman Towers filed a separate notice of appearance and an answer to the petition. Said answer asserts several affirmative defenses, including a defense that, because of Holub's death, petitioners have no standing to challenge the administrative determination on the grounds enumerated in the petition, a contention that would not preclude Petitioners' challenge since Barry is a co-operator under the agreement and a named respondent at the hearing and HPD and Cadman brought Weinstein into the proceeding and sought adjudication of his rights of occupancy. Cadman Towers' answer also asserts a claim for attorneys' fees based upon the occupancy agreement.

Petitioners requested an adjournment of the instant proceeding. At that time, no objection was raised to the summary of the hearing testimony, but such objection has been vigorously interposed in their reply papers dated October 24, 2005.

Discussion

Petitioners claim that respondents' failure to accept petitioners' offer to cure and the Hearing Officer's decision to issue a certificate of eviction were arbitrary and capricious and contrary to law and to HPD's own rules and regulations, discriminatory, beyond the scope of the hearing and therefore in vio-

lation of due process and not supported by the evidence. Petitioners claim that the hearing officer should have dismissed the charges against Weinstein when she learned that Weinstein was Barry's "father," and exceeded her authority by ruling upon the issues of the amount of time Weinstein spent in the apartment and whether he ever co-resided in the apartment with Holub and Barry.

Article 78 of the CPLR prohibits the IAS court to which a petition has been brought from reaching the issue of whether a determination is supported by substantial evidence, and requires that petitions involving such questions be transferred to the Appellate Division (CPLR 7803 [4] and 7804 [g]; *Blanco v Popolizio*, 190 AD2d 554, 554-555 [1993] ["if the Petitioner has raised a substantial evidence question, the court should not rule on other legal issues in the petition unless they terminate the proceeding"]; *O'Quinn v New York City Department of Housing Preservation and Development*, 284 AD2d 211 [2001]; *Hoch v New York State Department of Health*, 1 AD3d 994, 994-995 [2003]; *Nelson v City of Buffalo Fire Department*, 254 AD2d 761 [1998]. No question of substantial evidence is involved, and no transfer is required, where the only question raised in the Article 78 proceeding is either one of statutory interpretation or one of law (*see Ideal Corp. v New York State Tax Commission*, 132 AD2d 419 [1987]; *Save the Pine Bush, Inc. v Planning Board of the City of Albany*, 83 AD2d 741 [1981]). Such is not the case on the face of this petition. Here, petitioners assert that the hearing officer placed improper emphasis on only one of several factors available to determine primary residency, and they challenge the sufficiency of the evidence sup-

porting H.O. Lippa's determination that petitioners were guilty of violating HPD's primary residence and no sublet/no assignment rules and, thus, raise a substantial evidence question by questioning H.O. Lippa's factual findings (see *e.g. Encarnacion v Goord*, 8 AD3d 843 [2004]; *see also State Division of Human Rights v 1368 East 94th Street Corp.*, 293 AD2d 752 [2002]; *Willock v Schnectady Municipal Housing Authority*, 271 AD2d 818 [2000]).

"Although the court may dispose of 'such other objections [in point of law] as could terminate the proceeding' (CPLR 7804 [g]), an 'objection in point of law' is one raised either by respondent in the answer or by petitioner in response to 'new matter contained in the answer' (7804 [f] .... '[T]he apparent purpose of [subdivision (f) of CPLR 7804 referring to objections in point of law] is to permit a motion under any ground specified in CPLR 3211'" (*Hoch*, 1 AD3d at 994, *quoting Matter of Donofrio v City of Rochester*, 144 AD2d 1027, 1028 [1988], *quoting*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7). Petitioners urge this Court to address certain matters of law which they contend could be dispositive, specifically, that the hearing officer's written summary of the unrecorded or inaudible recording of the June 8, 2004 hearing proceedings is insufficient and inadmissible and, as a matter of law, the matter must be remanded for a new hearing. Since the summary was first provided in Respondent's answer, the issue will be addressed.

As previously noted, much of the June 8, 2004 hearing, including all of the testimony of the respondent's witnesses was, due to an apparent tape or

equipment malfunction, unrecorded, such that a true stenographic transcript could not be made of that portion of the proceedings. A written summary of those proceedings was requested by HPD and made by H.O. Lippa, based upon her notes taken during the proceeding and her personal recollection.

Petitioners argue that a complete and audible tape recording and/or a fully transcribed and readable record of the administrative hearing is a necessary element of due process, citing numerous cases. The pertinent inquiry is whether the gaps in the hearing record preclude meaningful review by the hearing court of petitioners' contentions under the substantial evidence and arbitrary and capricious standards, and whether petitioners are prejudiced thereby (*see Domingo v Popolizio*, 170 AD2d 305 [1991]; *Vogelsang v Coombe*, 105 AD2d 913, 914 [1984] [inaudibility of two or eight tape-recorded interviews by hearing officer of respondent's witnesses does not render record incomplete or inadequate]; *see also Redmond v Goord*, 6 AD3d 1207 [2004]; *Matter of O'Reilly v Goord*, 270 AD2d 858 [2000]; *Locke v Senkowski*, 254 AD2d 553, 554 [1998]). That determination can be made only by the reviewing court.

Since there are no other legal objections that would permit this Court to terminate the matter within the meaning of CPLR 7804 (g) without examining the merits of the substantial evidence issue (*see Hop-Wah v Coughlin*, 118 AD2d 275 [1986], *rev'd on other grounds* 69 NY2d 791 [1987]), and in light of the clear mandate to transfer to the Appellate Division all challengers to the sufficiency of the evidence (*Matter of Hoch*, 1 AD3d 994; *Matter of Margolin v*

Newman, 130 AD2d 312 [1987]; *see Steck v Jorling,* 219 AD2d 727 [1995] [Supreme Court should have transferred the entire proceeding to the Appellate Division where the petition raised a substantial evidence question and the remaining issues raised by the petitioner were not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)], this proceeding is hereby transferred to the Appellate Division, Second Department, for disposition of all issues raised in the petition and not decided herein. The Clerk of this court is directed, upon service of a copy of this order with notice of entry, to forward all papers in this proceeding to the Clerk of the Appellate Division, Second Department.

The foregoing constitutes the decision and order of this court.

ENTER,

s/ J.S.C.
J.S.C.

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS: IAS PART 19

In the Matter of the Application of

RAYMOND M. WEINSTEIN and JOHN BARRY,
Petitioners,

Index No. 21896/05

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

REPLY AFFIRMATION

THE CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and CADMAN TOWERS, INC.,
Respondents,

David G. Scudieri, an attorney duly admitted to practice before all of the Courts of the State of New York, hereby affirms to be true and correct under the penalties of perjury and pursuant to CPLR § 2106 the following:

1. I am a member of the firm of GOLDBERG, SCUDIERI, LINDENBERG & BLOCK, P.C., attorneys for the Petitioners, herein, Raymond M. Weinstein and John Barry.

2. Petitioners RAYMOND M. WEINSTEIN (herein "Weinstein") and JOHN BARRY ("Barry"), by their attorneys, GOLDBERG, SCUDIERI, LINDENBERG & BLOCK, P.C., hereby submit this Reply to Respondents' Answers. Respondent CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT ("HPD"), through their attorney AMY J. WEINBLATT (hereinafter "Weinblatt"), filed a Verified Answer dated September 22, 2005. Respondent CADMAN TOWERS, INC. ("Cadman"), through their attorney MIRIAM M. BREIER (hereinafter "Breier"), filed a Notice of Appearance and Answer dated September 21, 2005.

3. This Reply to both Answers consists of three parts. First, pursuant to CPLR § 7804(f), it is an objection in point of law to a new matter raised in HPD's Verified Answer. Petitioners object to the inclusion of Weinblatt's Exhibit "C" as evidence for review by this court. Exhibit "C" is a summary created by Administrative Hearing Officer Frances Lippa ("AHO Lippa") from the notes she kept of testimony on one particular tape that somehow went unrecorded. See EX. "C," ¶ 2-5; HPD Ans., p. 15. Pursuant to § 7804(g), Petitioners request that the court first dispose of the objection raised as it could terminate the proceeding. Second, this Reply is a rebuttal on legal and factual grounds to statements and allegations made by Weinblatt in her Verified Answer. Finally, the third part is a rebuttal on legal and factual grounds to statements and allegations made by Breier in her Notice of Appearance and Answer.

I. OBJECTION TO RESPONDENT HPD'S EXHIBIT "C"

4. Exhibit "C" is a reconstruction by AHO Lippa of almost half of the testimony given at the hearing she conducted for HPD. The determination by AHO Lippa against Petitioners Weinstein and Barry, and JOHN HOLUB ("Holub"), now deceased, former head of their household, is the subject of this Article 78 appeal.

5. The hearing was conducted over two days. Each day's testimony lasted three hours, from 10 a.m. to 1 p.m. The first day consisted of Cadman's three witnesses giving direct testimony, the cross-examinations of these three witnesses by Petitioners' attorney at the time, and the start of Petitioner Barry's direct testimony.

6. AHO Lippa has stated under oath that Tape 1972 in its entirety had nothing recorded on it (Ex. "C," ¶ 4). The faulty tape covered the direct testimonies of Cadman's three witnesses, their cross-examinations, and almost all of Barry's direct testimony on the first day. AHO Lippa started Tape 1973 toward the end of Barry's direct testimony. Barry's testimony for the remaining 15 minutes (approximately) on the first day, and his and other witnesses' testimonies for three hours on the second day, were recorded normally (HPD Ans., pp. 18-19).

7. Thus, according to AHO Lippa's own words, and those of HPD counsel Weinblatt, almost three hours of a six-hour hearing, including the entire case

put on by Cadman against Petitioners, went unrecorded and is lost forever.

8. AHO Lippa reconstructed the almost three hours of inaudible speech on that tape via a "summary of the testimony" from her notes (Ex. "C," ¶ 5). That summary, ¶ 6-49, covers less than 10 pages of double-spaced typescript. The balance of the little more than three hours of testimony, depicted in Exhibit "D," spans 122 double-spaced typed pages.

9. HPD counsel Weinblatt apparently believes Exhibit "C" is a "good substitute" or "legal equivalent" for the nearly three hours of missing testimony. In her Answer, she gives Exhibit "C" almost the same weight as she does Exhibit "D". While 65 lines are devoted to the 10-page summary of unrecorded testimony (HPD Ans., pp. 16-19), Weinblatt wrote only 70 lines to paraphrase the 122-page recorded testimony (Cadman Ans., pp. 19-22).

10. Petitioners strongly oppose the use of AHO Lippa's summary of the unrecorded testimony for review by this court. It is preposterous to think that less than ten pages of a summary, meant by Respondents to substitute for what would have been perhaps 113 pages of transcribed testimony, can ever be on equal terms with 122 pages of a verbatim transcript.

A. Incomplete Transcript Precludes Fair Review as a Matter of Law

11. The problem of an incomplete transcript of a trial or hearing before a body empowered to review

that trial or hearing is not new to jurisprudence. Any number of circumstances may arise whereby lengthy and critical portions of taped testimony may be damaged or lost because of machine failure or human error. In New York courts, the problem has come up many times in the past three decades alone.

12. In three criminal cases, the court reversed the judgment and ordered a new trial because of missing parts to the transcript and, since no one had any recollection of the proceedings, there was no alternative method of providing an adequate record for appellate review. *People v. Jacobs*, 286 A.D.2d 404 (2001); *People v. Cameron*, 219 A.D.2d 662 (1995); *People v. Hall*, 200 A.D.2d 474 (1994).

13. In many civil cases involving an administrative hearing, the determination was annulled and a new hearing ordered because of the absence of a verbatim transcript of the minutes of the hearing, missing pages of testimony, incomprehensible words and paragraphs, omissions of phrases and sentences, or lack of recording tape. *Matter of Roche v. Turner* et al., 186 Misc.2d 581 (2000); *Matter of Sullivan v. Buscaglia*, 75 A.D.2d 990 (1980); *Matter of Robinson v. Blum*, 73 A.D.2d 691 (1979); *Matter of Gutierrez v. Blum*, 73 A.D.2d 690 (1979); *Matter of Couball v. Staszak*, 70 A.D.2d 1027 (1979); *Matter of Anderson v. Toia*, 59 A.D.2d 1024 (1977). *Matter of McIver v. Berger*, 55 A.D.2d 606 (1976); *Matter of Halley v. Lavine*, 47 A.D.2d 945 (1975); *Cruz v. Lavine*, 45 A.D.2d 720 (1974); *Matter of Bolden v. Bolden*, 29 A.D.2d 520 (1967); *Matter of Kelley v. Monaghan*, 9 A.D.2d 92 (1959). The courts in these cases ruled that the commissioner of the New York State agency

could not make a fair review of the hearing officer's determination if he or she did not or could not read a complete transcript of the hearing.

14. Decisions in two Second Circuit cases, New York's federal court for appeals, support those of the New York State Appellate Division. In *Scime v. Bowen*, 822 F.2d 7 (1987), there was an inaudible taped transcript, while in *Pratts v. Chater*, 94 F.3d 34 (1996), the hearing record was significantly compromised by the failure to transcribe crucial testimony. Decisions of the district court were reversed and new proceedings ordered.

B. Hearing Officer's Notes Deficient for Fair Review as a Matter of Law

15. The issue of the hearing officer's views or notes has come up in a number of cases before the Appellate Division of the New York Supreme Court when there were problems with the transcript. In *Matter of McIver v. Berger*, 55 A.D.2d 606 (1976), *Matter of Couball v. Staszak*, 70 A.D.2d 1027 (1979), and *Matter of Halley v. Lavine*, 47 A.D.2d 945 (1975), the courts clearly stated the state agency reviewing an administrative decision may not depend on the hearing officer's view of the evidence, that it was improper to do so. In *Cruz v. Lavine*, 45 A.D.2d 720 (1974) and *Matter of Gutierrez v. Blum*, 73 A.D.2d 690 (1979), the courts wrote that a review of a hearing is not accomplished by a review of notes taken during the hearing, that the hearing officer's informal handwritten notes could not form the basis for a proper determination.

16. The three judges reviewing the *Couball* case perhaps put it best when they said "the hearing officer's view of the evidence . . . is wholly inadequate to provide (the Commissioner) with the means to make an 'informed decision' . . . (and) . . . it does not summarize the evidence adduced at the hearing, nor does it contain any factual findings or even recite the substance of what transpired at the hearing."

17. In these cases involving the hearing officer's notes or views, the court ruled out such so-called "evidence," annulled the determination, and ordered a new hearing.

D. Reviewing Court Cannot Judge Arbitrariness of AHO Lippa's Decision

33. CPLR § 7803(4) permits an Article 78 petitioner to question whether a determination made as a result of a hearing was based "on the entire record." If it can be shown that the determination was not made as a result of the benefit of the entire record, then the petitioner would be entitled to a reversal of that determination.

34. Carrying the civil practice statute one level higher, the same legal principle would apply to the Supreme Court of New York. If this court, in fulfilling its mandated function to review an administrative decision, did not have the benefit of the entire record of the hearing because significant portions of the taped testimony went unrecorded, then its decision would be subject to reversal as well. During the past three decades, Supreme Court judges who were faced with incomplete transcripts and who an-

nulled the administrative decisions and ordered a new hearing made the appropriate ruling and no doubt avoided almost certain reversal.

35. Another problem further limiting this court's ability to conduct a fair review of AHO Lippa's determination is the fact that neither counsel currently arguing the case has any independent knowledge of the almost three hours of missing testimony. HPD counsel Weinblatt was assigned the task of defending AHO Lippa's determination only after Petitioners filed this Article 78 appeal. Similarly, Petitioners counsel, Goldberg Scudieri, was engaged after AHO Lippa issued her determination. Neither counsel was present during the six hours of the hearing in this case. Both counsel's task of defending their respective clients is doubly difficult because not only were they not privy to the testimony given but almost half of the testimony they would normally listen to or read in transcription in order to prepare a defense is missing.

36. Finally, several federal appeals cases in other circuits shed light on the issue here of an incomplete transcript. In *United States of America v. Brown*, 202 F.3d 691 (2000), it was pointed out that a demand for a new trial would not fail if it can be demonstrated that prejudice would attach because of discrepancies between the defendant's recollection and the Government's version. Moreover, courts in three different federal circuits noted that if the missing parts to the transcript are significant enough and the prejudice attached substantial enough, then the problem rises to the level of a due process violation. *Singh v. Ashcroft*, 114 Fed. Appx. 324 (2004);

Yeboah v. Ashcroft, 68 Fed. Appx. 483 (2003); *Wang v. Ashcroft*, 84 Fed. Appx. 197 (2003).

Affirmed: New York, New York
October 24, 2005

s/ David G. Scudieri
DAVID G. SCUDIERI, ESQ.

NEW YORK SUPREME COURT
APPELLATE DIVISION--SECOND DEPARTMENT

In the Matter of the Application of
RAYMOND M. WEINSTEIN and JOHN BARRY,
Petitioners,

For an Order pursuant to Article 78 of the Civil Practice Law and rules,

- against –

THE CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and CADMAN TOWERS, INC.
Respondents,

BRIEF FOR PETITIONERS

Docket No. 2006-2181

DAVID SCUDIERI
GOLDBERG, SCUDIERI
LINDENBERG & BLOCK, P.C.
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(212) 921-1600

Attorneys for Petitioners Raymond M. Weinstein and John Barry

FACTUAL HISTORY

Petitioners Weinstein and Barry filed a Verified Petition on July 14, 2005, in Kings County Supreme Court pursuant to Article 78 of the CPLR. This was an appeal to a Decision and/or Certificate of Eviction (see Verified Petition, Exhibit E) issued by Respondent City of New York Department of Housing Preservation and Development ("HPD").

Petitioners RAYMOND M. WEINSTEIN ("Weinstein") and JOHN BARRY ("Barry"), by their attorneys GOLDBERG, SCUDIERI, LINDENBERG & BLOCK, P.C., hereby submit this Verified Brief and respectfully allege as follows:

The Decision and/or Certificate dated March 23, 2005, signed by Frances Lippa ("Lippa"), HPD Administrative Hearing Officer ("AHO"), authorized the eviction of Weinstein, Barry, and John J. Holub ("Holub"), who died on March 21, 2005, all occupants of Apartment 18A, 101 Clark Street, Brooklyn, New York.

Petitioners' Article 78 appeal sought a judgment vacating and annulling the HPD eviction authorization and staying Respondent Cadman Towers, Inc. ("Cadman"), Petitioners' housing provider and managers of their apartment building, from enforcing the eviction.

On February 2, 2006, the Honorable Carolyn E. Demarest ("Judge Demarest"), Justice of the Supreme Court, issued her Decision in the instant case (**EXHIBIT A**).

In her Decision, Judge Demarest focused on two (2) issues: (a) the sufficiency of the evidence the Hearing Officer used against Petitioners and (b) the gaps in the HPD hearing record and the ability of the Court to make a meaningful review.

Judge Demarest determined that (a) petitioners "raise a substantial evidence question by questioning H.O. Lippa's factual findings" (p. 11) and (b) the issue of gaps in the hearing record is likewise a challenge to the "sufficiency of the evidence" (p. 13).

Because petitioners raised two (2) substantial evidence issues, and there were "no other legal objections that would permit this Court to terminate the matter within the meaning of CPLR 7804" (p. 13), Judge Demarest transferred this case to the Appellate Division. By law, challenges to the sufficiency of the evidence must be decided by the higher court.

Pursuant to Appellate Division rules, the Request for Judicial Intervention was filed with this Court in a timely manner. This Verified Brief and the perfection of the record, appropriately, are filed prior to August 2, 2006, within six (6) months of Judge Demarest's Decision.

The two issues Judge Demarest focused on, two separate justifications for transferring the case to the Appellate Division, are discussed below. The issue of the gaps in the hearing record is discussed first, however, as a ruling in favor of Petitioners here would necessarily render the consideration of the sufficiency of AHO Lippa's evidence and arbitrariness of her Decision moot.

POINT I.
GAPS IN THE HEARING RECORD REQUIRE THAT THIS COURT ORDER A NEW HEARING

The gaps in the hearing record were caused by a failure in HPD's recording system on the first of two days of testimony. AHO Lippa stated under oath that the first tape she used, in its entirety, had nothing recorded on it (see respondent HPD's Verified Answer, Exhibit C).

Missing from the first day of the hearing was, as Judge Demarest indicated (a) the direct testimony of Cadman's three witnesses and (b) the start of Petitioner Barry's direct testimony. Lost from the hearing record too was (c) the cross-examinations of Respondent's three witnesses by Petitioners' attorney at the time and (d) the opening statements of AHO Lippa, Cadman's attorney, and Petitioners' attorney.

The missing portions of the HPD hearing record constitute almost fifty percent (50%) of the entire eviction proceeding, almost three (3) hours of a six (6) hour hearing over two (2) days.

The whole case put forth by Respondent Cadman went unrecorded. This Court has no verbatim transcript of the testimony presented against Petitioners, the cross-examinations of Respondent's witnesses, objections to Respondent's testimony or attorney cross-examinations, and AHO Lippa's rulings on objections from attorneys on both sides. In short, the Court cannot review Respondent's evidence or judge AHO Lippa's use of that evidence in her determination against Petitioners.

A "complete record" for judicial review is required by law. However, the fact that a hearing record has gaps or inaudible parts in it does not automatically render it "unreviewable" by a court of law.

Judge Demarest considered this issue and put it well. She put the right questions to the Appellate Division when she stated: "The pertinent inquiry is whether the gaps in the hearing record preclude meaningful review by the hearing court of Petitioners' contentions under the substantial evidence and arbitrary and capricious standards, and whether petitioners are prejudiced thereby" (p. 12).

Whether this Court, in light of the missing half of the record, can or cannot review the sufficiency of the evidence used to evict Petitioners is a legal question. In New York courts or hearings, the issue of gaps has surfaced numerous times. Decisions in these other cases offer guidance here.

The wording of the Decisions in these other cases indicate that it was not so much gaps *per se* that was important to the courts as (a) the "significance" of the gaps, (b) the "reviewability" of a record with missing parts, and (c) an incomplete record's "prejudice to petitioners." Judge Demarest correctly covered these very points in her question.

A. Significance of the Gaps

The significance of the gaps in legal cases was at times determined by the "amount" of the parts that were missing.

Some courts stated the gaps were not significant by implying the amount missing was not great. Judges referred to "isolated parts" of the transcript, "intermittent gaps" in the record, or "inaudible portions" of the tape. *Peterkin v. Reid*, 105 A.D.2d 707 (1984); *Wynter v. Jones*, 135 A.D.2d 1032 (1987); *Domingo v. Popolizio*, 170 A.D.2d 305 (1991); *O'Reilly v. Goord*, 270 A.D.2d 858 (2000); *Redmond v. Goord*, 6 A.D.3d 1207 (2004).

In other cases, the courts decided the amount of the gaps were significant and annulled the determinations and ordered new hearings. A little more than half the transcript in *Matter of Roche v. Turner et al.*, 186 Misc.2d 581 (2000) was "largely incomprehensible" due to many words and paragraphs that were "either indecipherable or missing." The typed testimony in *Matter of Robinson v. Blum*, 73 A.D.2d 691 (1979) was likewise deemed unacceptable because of "numerous omissions of words, phrases and/or sentences." Decisions were reversed in *Matter of Halley v. Lavine*, 47 A.D.2d 945 (1975) because an "exact rendition" of the testimony at the hearing was not available, and in *Matter of Sullivan v. Buscaglia*, 75 A.D.2d 990 (1980) because of the lack of a "full record."

The courts also evaluated the significance of the gaps by the "materiality" of the parts that were missing.

In *Rodriquez v. Coughlin*, 167 A.D.2d 671 (1990) and *Locke v. Senkowski*, 254 A.D.2d 553 (1998), it was stated that the missing information was "not

material to the determination" and previous judgments were affirmed.

In four (4) cases, when evidence material to a hearing or court was missing, the decisions were reversed, annulled, or remanded for further review. The incomplete transcript submitted to the Family Court in *Matter of Bolden v. Bolden*, 29 A.D.2d 520 (1967) included no testimony relating to the main issue of the case. In *Matter of Anderson v. Toia*, 59 A.D.2d 1024 (1977), the testimony of petitioner's witness was not transcribed because the recording tape ran out. The failure to transcribe a portion of a medical doctor's testimony in a disability case, *Pratts v. Chater*, 94 F.3d 34 (1996), was thought to be crucial enough to significantly compromise the hearing record. In *People v. Jacobs*, 286 A.D.2d 404 (2001), the defendant was entitled to a summary reversal of the judgment and a new trial because the transcript was missing the summations, the jury instructions, and a read back of the charges.

In the instant case, the amount of the gaps in the hearing record is extremely significant. Just about half the entire record was lost. A transcript that is only 50-55% of what it should be cannot, by any stretch of the imagination, be taken as a near complete record with just a few inconsequential omissions or inaudible words.

It can also be said with certainty that the 45-50% gap in the hearing record is absolutely material to the determination made by the hearing officer. The missing parts cover the main issues of the case (Cadman's allegations of non-primary residence and il-

legal subletting), the testimonies (direct and on cross) of all three witnesses called by Cadman, and the opening statements of AHO Lippa.

B. Reviewability of a Record with Missing Parts

The reviewability of a record with missing parts is an important issue that has been addressed in a number of cases. Essentially, the courts were concerned with whether a "fair" or "meaningful" review, a person's right under the law, was possible given a situation in which a transcript had gaps or inaudible portions. Reviewability was determined by several different factors.

In *Vogelsang v. Coombe*, 105 A.D.2d 913 (1984), the court pointed out that the gap was a "duplication" of what was already in the record and therefore "does not render the record incomplete or inadequate." Two of eight tape-recorded interviews the hearing officer conducted were inaudible. The other six testimonies were audible and consistent with the missing two, which were based on interviews con-tained in the confidential file.

Reviewability in *Thomas v. Coughlin*, 145 A.D.2d 695 (1988) was determined by the "completeness" of the record notwithstanding some missing parts. Although there were at least 60 inaudible gaps in the transcript, the court ruled they "were not so significant that they preclude meaningful review." The judge decided the record was complete and thus suitable for review by saying: "All documents on which the Hearing Officer relied are in the record."

In two cases, the "reproducibility" of the record determined whether the court would review it or not. The minutes of the *voire dire* were incapable of being transcribed in *People v. Cameron*, 219 A.D.2d 662 (1995). Similarly, in *People v. Hall*, 200 A.D.2d 474 (1994), the minutes of the trial were lost. In both criminal cases, the fact that the attorneys had no independent recollection of the proceedings was a critical issue leading to the judgments being reversed and defendants being granted a new trial. The record could not be accurately reconstructed and an alternative method of providing an adequate record was unavailable.

The *Cameron* and *Hall* decisions have relevance for the instant case. This Court's ability to conduct a fair review is hampered by the fact that respondent's lead counsel and petitioners' counsel both have no independent knowledge of the almost three hours of missing testimony. HPD's counsel was assigned the task of defending AHO Lippa's determination only after petitioners filed this Article 78 appeal. Petitioners' current counsel was engaged only after AHO Lippa issued her determination. Neither counsel was present during the six hours of the hearing in this case. They were not privy to any of the testimony given and almost half of the testimony they would normally listen to or read in transcription to argue the case is missing.

Based on the different factors courts have ruled a transcript with missing parts can be reviewed on appeal, it can be stated emphatically that petitioners' case cannot be fairly or meaningfully reviewed by this Court.

The missing first half of the transcript, containing all of respondent's evidence and allegations, is not duplicated in the second half. The second half, the petitioners' testimony and rebuttals, is wholly different from the first.

The missing first half of the transcript renders the existing record incomplete and unsuitable for review by a court of law. A reading of AHO Lippa's own words in her decision should leave no doubt in anyone's mind that she relied heavily on respondent Cadman's witnesses' testimony (in what should have been the first half of the transcript) in making her ruling. The 50% gap in petitioners' record precludes meaningful review by this Court.

In the instant case, it appears that the missing first half of the transcript could never have been accurately reproduced, in spite of the fact that there were people with independent recollections of the hearing.

Petitioners and their counsel were informed of the recording failure by HPD's counsel on or about September 8, 2005. They were told that AHO Lippa was prepared to recreate from her notes a "summary" of what transpired on the first day of the hearing and was not recorded on the first tape. Petitioners were asked to stipulate to the recreated summary and/or suggest changes so that the court would have a reviewable record.

Petitioners were never given an opportunity to review and stipulate to or change a recreated summary for the Court. HPD's counsel faxed a copy of

the summary to petitioners' counsel on September 19, 2005. Petitioners' counsel could not review the summary and stipulate to its accuracy as he had not been present at the HPD hearing. Petitioners' counsel, due to other commitments, did not fax a copy to petitioners for their perusal and possible stipulation to until September 21. This was the same day Cadman's counsel (who was present at the HPD hearing) filed a Notice of Appearance and Answer, and a day before HPD's counsel (who had no independent knowledge of what was said at the hearing) filed a Verified Answer with the summary as Exhibit C. HPD and Cadman should have given petitioners more than two or three days to review the summary and agree to changes before they presented it to the Court as a substitute for the missing half of the transcript.

As it turned out, petitioners had much to oppose, and would have stipulated to little, in AHO Lippa's reconstructed summary. In petitioners' Reply Affirmation ¶¶ 4-36, they presented their comments and criticisms. Given the magnitude of what petitioners believed were errors and omissions, had a reconstruction hearing been scheduled it is doubtful that the two parties could have agreed to a single document for appellate review. No alternative method of reproducing an adequate record of the missing part of the transcript was feasible.

As a matter of law, HPD's method of correcting the problem of the missing half of the transcript, a summary of the proceedings by a hearing officer, is deficient for a fair review.

This issue has come up in a number of cases before the Appellate Division when there were problems with the transcript. *Matter of McIver v. Berger*, 55 A.D.2d 606 (1976); *Matter of Couball v. Staszak*, 70 A.D.2d 1027 (1979); *Matter of Halley v. Lavine*, 47 A.D.2d 945 (1975); *Cruz v. Lavine*, 45 A.D.2d 720 (1974); *Matter of Gutierrez v. Blum*, 73 A.D.2d 690 (1979). The courts clearly stated that a review of a hearing is not accomplished by a review of notes taken during the hearing, that an administrative decision may not depend on the hearing officer's view of the evidence, that a hearing officer's view does not summarize the evidence adduced at the hearing or contain any factual findings or even recite the substance of what transpired at the hearing.

In these cases involving the hearing officer's notes or views, the court ruled out such so-called "evidence," annulled the determination, and ordered a new hearing.

AHO Lippa's summary of what transpired on the first day of the two-day hearing should be deemed unreviewable by this Court because it is biased in favor of Cadman and their three witnesses. Her summary is noteworthy for its omissions of testimony relevant to petitioners' case as well as its silence on the contradictions inherent in respondent's witnesses' testimony.

Petitioners believe AHO Lippa was arbitrary and capricious in the material she selected to be summarized for her reconstruction of the lost testimony.

C. Incomplete Record's Prejudice to Petitioners

Courts have decided that an incomplete record can prejudice a person brought before an administrative hearing or to trial in different ways.

Prejudice would attach, for example, if there were "discrepancies" between different versions of a hearing that cannot be resolved. In *United States of America v. Brown*, 202 F.3d 691 (2000), the defendant's demand for a new trial based on an incomplete transcript failed because he did not argue there were discrepancies between his recollection of a proceeding and the government's version that required resolution by reference to the transcript. The judge said the defendant was "unable to demonstrate prejudice" because he did "not dispute the central facts necessary for appellate review."

The *Brown* case offers guidance here. Petitioners believe prejudice does attach to their appeal since there are many discrepancies between respondent's version of the first half of the hearing (AHO Lippa's summary) and their recollections (Reply Affirmation ¶¶ 18-32). These discrepancies cannot be resolved because there is no transcript of the first half of the hearing to resolve them with. Petitioners most certainly dispute the central facts necessary for appellate review.

Another way an incomplete record might prejudice petitioners is by "grounds for reversal" or "appealable issues." In *United States of America v. Locust*, 95 Fed. Appx. 507 (2004), the Court of Appeals denied the defendant a new trial. Statements purportedly

made during opening arguments, the court wrote, "would not, of themselves, provide grounds for reversal" since "Locust is not prejudiced by the transcript's omission of those statements." The defendant also contended that he was prejudiced by the transcript's closing arguments, but the judge noted "he had the wherewithal to appeal any issue relating to the tape's use at trial" and therefore "suffered no prejudice."

Similarly, in *Santiago v. Coughlin*, 107 F.3d 4 (1997), the Court of Appeals stated the petitioner "failed to identify any appealable issue with respect to the missing minutes" from the transcript and "has not established that he was prejudiced by the state appellate court's denial of a reconstruction hearing." The decision of the lower court was affirmed because there was no evidence to support the claim that the missing portions reflected "reversible error."

The *Locust* and *Santiago* cases likewise offer guidance here. The 50% gap in HPD's transcript of the hearing they conducted most certainly prejudices petitioners in this appeal. The missing portions are not simply self-serving or gratuitous statements by the AHO or attorneys at the opening or closing of the six-hour proceeding, but rather the "heart and soul" of respondent's allegations and evidence put forth in the first three hours. The gap is significant both in terms of the amount of testimony lost and its materiality to the case. Couched within the missing portions are the appealable issues petitioners have raised (see discussion below of the sufficiency of the evidence and the arbitrariness of the AHO's decision), the substance of the grounds for reversal.

Finally, it can be said, if an incomplete transcript is so replete with errors and omissions, or if a complete and accurate transcript might have changed the outcome of a case, then this would constitute a "violation of due process." *Wang v. Ashcroft*, 84 Fed. Appx. 197 (2003); *Yeboah v. Ashcroft*, 68 Fed. Appx. 483 (2003); *Singh v. Ashcroft*, 114 Fed. Appx. 324.

Petitioners believe an appellate review of this case armed with only half a transcript and a hearing officer's summary that is deficient as a matter of law would perforce be prejudicial and would deny them their due process rights.

Yours. etc.,

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